



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: DTM Inc.
File: B-241270.2
Date: February 15, 1991

John J. Dillon for the protester.
John R. McCaw, Esq., Federal Aviation Administration, United States Department of Transportation, for the agency.
Katherine I. Riback, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that other firms' lower prices submitted in response to an oral solicitation for a short-term, urgent requirement were "suspect" because the agency did not provide those firms with the information necessary to compete intelligently and on an equal basis is denied where agency did provide those firms with copies of the specifications from the protester's prior contract and of its collective bargaining agreement.
2. The submission of a below cost price is not illegal and provides no basis for challenging the award of a fixed-price contract to a responsible contractor.
3. Protest challenging affirmative determination of responsibility is denied where there were no definitive criteria to be applied and protester fails to show that affirmative responsibility determination by the contracting agency was the result of bad faith--notwithstanding protester's disagreement with contracting agency's conclusion--because record contains no evidence that government officials acted with specific and malicious intent to harm the protester.

DECISION

DTM Inc. protests the award of an interim, 2-month building maintenance services contract at the New York Air Route Traffic Control Center (ARTCC), Ronkonoma, New York, by the Federal Aviation Administration (FAA) to All Prestige Management Corporation. DTM contends that the prices that the agency received were suspect and may have been below that of the protester because prospective contractors were not provided with adequate information and, because of their

relationships as former employees of or subcontractors to DTM, they may have made use of pricing of the protester information gained in those capacities. The protester also questions whether All Prestige has the experience to perform this contract.

The protest is denied.

This protest concerns the propriety of awarding to All Prestige a contract to provide building maintenance services on an urgent, short-term basis when, for reasons unrelated to DTM's protest, coverage under that firm's prior contract ended sooner than the agency originally had contemplated and a new, competitive procurement had not been concluded. Pursuant to a Justification for other than Full and Open Competition on the basis that the FAA facility could not do without these services for this 2-month period, the contracting officer decided to obtain the services from All Prestige as the lowest-priced firm responding to an oral solicitation limited to four firms, including the protester, who was the highest-priced.

The protester contends that the prices received from the other firms were "suspect" in the first instance because the other firms did not have available the information necessary to intelligently prepare their prices. The agency has stated, however, that it provided all the firms with a copy of the specifications contained in the protester's previous contract, including matrixes showing the frequency of services required, and a copy of the protester's recent collective bargaining agreement. Because it appears the agency did provide the parties with the information necessary to allow them to price these services intelligently and on an equal basis, this issue of the protest is denied.

The protester also contends that the prices quoted are suspect because of the three firms chosen by the contracting office to participate, all had past ties to DTM, either as former employees or subcontractors. The protester argues that their lower prices may have been motivated by "personal reasons" growing out of their prior relationships with DTM or with each other and that they may have used information gained during their association with the protester, specifically DTM's labor and pricing policies.

The protester's allegations concern the actions of former employees of or subcontractors to the incumbent contractor is an issue which is beyond the scope of our bid protest function. It involves a dispute between private parties concerning business practices and relationships that is

properly for resolution by the private parties through the courts. Creative Medical Management, Inc., B-236266.2, Aug. 15, 1989, 89-2 CPD ¶ 143.

The protester also contends that the price submitted by All Prestige is "unbalanced to meet . . . wages and associated costs." The awardee's single, fixed-price-per-month offer cannot be considered "unbalanced" as that term is normally used. A materially unbalanced bid is one which creates reasonable doubt that it actually will result in the lowest overall cost to the government because of nominal prices for some items and enhanced prices for other items. Northwest Cleaning Serv., B-234780, May 31, 1989, 89-1 CPD ¶ 523. We believe that the protester effectively is alleging that the awardee's price was below cost. The submission of a below-cost offer is not illegal and provides no basis for challenging the award of a firm, fixed-price contract to a responsible contractor since it is the offeror's loss and not the government's if the cost of performance exceeds the contract price. E & T Elecs., Inc., B-238099.2, July 10, 1990, 90-2 CPD ¶ 24.

Next, DTM alleges that "definitive responsibility criteria" were not met by the awardee. DTM has not identified what "definitive responsibility criteria" apply to this procurement and we are aware of none. Rather, DTM's assertion that All Prestige does not have adequate experience to perform this contract is a challenge to the FAA's general determination that All Prestige is a responsible contractor. Our Office will not review an affirmative determination of responsibility, which is largely a business judgment, unless there is a showing that definitive responsibility criteria in the solicitation were not met or a showing of possible fraud or bad faith on the agency's part. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1990). As we indicated above, the first exception is not applicable to this case.

As for the second, DTM does contend that the contracting officer has acted in bad faith to deliberately ensure that it did not receive the 2-month interim contract and implies that the contracting officer is biased against DTM because it is a unionized company. Government officials are presumed to act in good faith and therefore, in order to establish bad faith, a protester must present convincing proof that they had a specific and malicious intent to injure the protester.

Diversified Contract Servs., Inc., B-237209, Jan. 22, 1990,
90-1 CPD ¶ 84. Here, the protester presents only speculation,
and offers no probative evidence that the contracting officer
was motivated by bad faith or prejudice against DTM.

The protest is denied.


for James F. Hinchman
General Counsel